No. 87-1484 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 751,

Petitioner,

v.

THE BOEING COMPANY AND THOMASINE NICHOLS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT NICHOLS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Thomasine Nichols respectfully requests that this Court deny the petition for writ of certiorari filed by the International Association of Machinists, District Lodge 751 ("IAM" or "Union") seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 833 F.2d 165 (1987).

COUNTERSTATEMENT OF FACTS

Thomasine Nichols, the daughter of overseas missionaries, became convinced through extensive personal Bible

study that membership in a labor union is inconsistent with the teachings found in the twentieth chapter of the Gospel of Matthew. She reached that conclusion at age 14; and from that point on she never joined a union.

Many years later she became an employee of the Boeing Company. There, she was warned that she would have to join or pay dues to the IAM to retain her employment. This she could not do without violating her conscience. Desiring to keep her job, however, she asked that she be allowed to pay the demanded fees to a charity instead of to the Union. Boeing agreed to this arrangement, but the IAM would not.

In order to force Mrs. Nichols to choose between her job and her long-held religious beliefs, the Union sued her and the Boeing Company in federal district court. The Union did not formally contest the sincerity of Mrs. Nichols' religious beliefs in court. Instead, it asked the court to declare unconstitutional the religious accommodation requirements of Title VII of the Civil Rights Act of 1964 and Section 19 of the National Labor Relations Act. In the alternative, the IAM asked the court to hold that Section 19 of the NLRA repealed or modified Title VII. The district court refused to do either; the Union appealed; and the Ninth Circuit affirmed.

REASONS FOR DENYING THE WRIT

The petitioner does not claim there is a conflict among the circuit courts on the issues raised herein. As a matter of fact, the circuit courts that have ruled on these issues are in complete accord and support the respondent.

The petitioner cannot claim that while deciding the issues presented to it the lower court departed from the

legal standards previously established by this Court. The only claimed departure of the lower court arises from an issue which the Union raises for the first time in its petition. While the petitioner argues inconsistency in issues not before the lower court, the core issues which were before the lower court were decided in accord with this Court's decision last term in *Corporation of Presiding Bishop v. Amos*, _____ U.S. _____, 107 S. Ct. 2862 (1987).

Instead of presenting a case which calls upon this Court to exercise its supervisory powers, the petitioner simply calls upon this Court to give it yet another hearing.

As will be seen, the decision below is fully consistent with lower court precedent, and adheres to the opinions of this Court.

1. *Neither the decisions below nor the record tests the facts of this case by the* TWA v. Hardison *standard.*

Initially, the IAM argues for review on the basis that an accommodation of Mrs. Nichols' religious beliefs would create more than the *de minimis* hardship permitted in *TWA v. Hardison*, 432 U.S. 63 (1977). Whatever the merits of that claim, this is the first time the IAM has raised any factual defenses, much less an allegation that an accommodation would create an undue hardship.

The district court noted in its decision that the IAM asked for summary judgment on two grounds: first, that § 19[1] of the National Labor Relations Act superseded

[1] 29 U.S.C. § 169.

Title VII;[2] second, that the religious accommodation provisions of Title VII violate the Establishment Clause of the First Amendment.[3] When the case came to the court of appeals, that court noted that the Union raised the same two issues.[4]

In the docketing statement filed with the court of appeals the IAM listed the issues to be raised on appeal as follows:

> 1. Does the later enacted Section 19 of the NLRA, which specifically addresses the balance to be drawn between the public interest furthered by union security clauses and the individual interest furthered by the accommodation of religion, govern over the more general Title VII duty to accommodate religious beliefs?
>
> 2. Does Section 19 of the NLRA violate the Establishment Clause of the First Amendment by giving an absolute preference to employees' religious motives for refusing to pay union fees required under a valid collective bargaining agreement?
>
> 3. Does the Title VII religious accommodation requirement violate the Establishment Clause of the First Amendment by giving an absolute preference to employees' religious motives for refusing to pay union fees required under a valid collective bargaining agreement?

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[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

[3] Petition at A-16

[4] Petition at A-4. The Union also argued that § 19 of the NLRA violated the Establishment Clause of the First Amendment, but neither the district court nor the court of appeals addressed that issue because Mrs. Nichols acknowledged that she was not covered by § 19.

From the day it asked the district court to grant summary judgment on undisputed facts until the day that it filed this petition, the IAM has never challenged an accommodation of Mrs. Nichols or any other religious objector who works for Boeing on the basis that it would create an undue hardship.[5]

The court below did not misapply the *Hardison* standard, for it was never asked to apply that standard to the facts of this case.

2. *The circuit courts agree that the religious accommodation provisions of Title VII do not offend the Establishment Clause.*

The constitutionality of the religious accommodation provisions of Title VII has been uniformly upheld by every United States Court of Appeals to have considered the issue. *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 474 (1986); *McDaniel v. Essex International*, 696 F.2d 34, 37 (6th Cir. 1982); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *Anderson v. General Dynamics*, 648 F.2d 1247, 1248 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Tooley v. Martin Marietta*, 648 F.2d 1239 (9th Cir.

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[5] The petition makes several references to Mrs. Nichols' support for the "National Right to Work Defense Committee" and suggests that organization will assist other employees in raising religious objections to the payment of union fees. These references imply that Right to Work is sponsoring insincere objectors or that Mrs. Nichols is insincere because she believes in the right to work. Such erroneous speculation is most unwarranted in the context of this case for, as the court of appeals noted, the IAM has not contested the sincerity of Mrs. Nichols' religious beliefs. Petition at A-7. The counterstatement of facts shows that Mrs. Nichols' religious beliefs about supporting labor unions were in place long before Boeing, the IAM or Right to Work came on the scene.

1981), *cert. denied*, 454 U.S. 1098 (1981); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *Hardison v. Trans World Airlines*, 527 F.2d 33, 43-44 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977).

Parallel state laws have also generally been upheld. *See, e.g., Kentucky Commission on Human Rights v. Kerns Bakery*, 644 S.W.2d 350, 352 (Ky. Ct. App. 1982), *cert. denied*, 462 U.S. 1133 (1983); *Rankins v. Commission on Professional Confidence*, 24 Cal.3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, *app. dism. for want of substantial federal question*, 444 U.S. 986 (1979).

This Court on two occasions has considered cases which potentially raised the constitutionality of the religious accommodation provisions of Title VII; and on neither occasion has this Court even intimated any doubts as to its constitutionality. *TWA v. Hardison*, 432 U.S. 63 (1977); *Ansonia Board of Education v. Philbrook*, _____ U.S. _____, 107 S. Ct. 367 (1986). *See also Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

Moreover, a decision handed down by this Court last term all but forecloses the IAM's attack on the constitutionality of religious exemptions under Title VII. The union argues that the creation of an exemption for religious objectors runs afoul of the Establishment Clause.[6] In *Corporation of Presiding Bishop v. Amos*, _____ U.S. _____, 107 S. Ct. 2862 (1987), this Court ruled that an exemption for religious employers from the provisions of Title VII did not offend the Establishment Clause. Since this Court has upheld the constitutionality of an absolute

[6] Petition at 9.

exemption for religious employers, it follows that the lower court correctly upheld an exemption for religiously motivated employees which is limited so as not to create an undue hardship for employers and unions. *Cf. Estate of Thornton v. Caldor*, 472 U.S. 703, 711 (O'Connor, J., concurring).

3. *It is the petitioner's argument and not the lower court's decision which departs from precedent.*

Faced with the long-established and uniform stance of the courts of appeals and this Court's decision in *Amos*, the IAM launched itself on a quixotic hunt for a new standard by which to judge establishment claims.

What the IAM found as an alternative establishment test is not clear from its petition. The Union appears to argue that Congress may affirmatively act to protect religious faith and practice *only* from governmental interference.[7] The IAM asserts that since union security provisions under the National Labor Relations Act are private agreements which do not involve "state action",[8] the congressional attempt to protect religious faith and practice through the religious accommodation provisions of Title VII is unconstitutional.[9]

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[7] Petition at 6.

[8] The suggestion that union security agreements under the NLRA do not involve state action will come as a surprise to those members of Congress who spoke in favor of the most recent amendment to 29 U.S.C. § 169 (the religious exemption clause). Even a cursory review of the legislative history of this amendment reveals numerous references to the fact that this exemption was necessary to protect the First Amendment rights of religious objectors. 126 Cong. Rec. 2580-2584 (1980).

[9] Petition at 7-9. Of course, the IAM does not discuss the anomalous result that flows from its logic: that employers and unions in the public sector and those under the Railway Labor Act will be required to accommodate the religious beliefs of employees, but those under the NLRA will not.

The question of whether the scheme of exclusive representation and resulting union security agreements under the National Labor Relations Act involves state action is obviously a question worthy of review by this Court, for it currently has before it a case which raises that issue. *Beck v. Communications Workers of America*, ____ U.S. ____, 107 S. Ct. 2480 (1987). While the issue of whether union security provisions under the National Labor Relations Act involve state action may be an important issue for this Court to resolve, the existence *vel non* of state action is not logically or historically a part of the establishment test.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court set out the classic three-part establishment test. No part of that test asks whether the statute in question operates as a restraint on governmental interference with the individual's right to practice his religious beliefs.

This Court has never suggested that the parameters of the Establishment Clause were *conterminous* with those of the Free Exercise clause of the First Amendment. As this Court said in *Walz v. Tax Commission*, 397 U.S. 664 (1970), "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz*, at 673. *Accord, Amos*, 107 S. Ct. at 2867. Instead, this Court has repeatedly found no establishment problem in exempting religious objectors or organizations from state-imposed duties even when the exemption was not compelled by the Free Exercise Clause. *E.g., Amos, supra; Gillette v. United States*, 401 U.S. 437, 453, 461 n.23 (1971); *Walz, supra; Welsh v. United States*, 398 U.S. 333, 371-72 (1970) (White, J., dissenting).

If the state does not establish religion over nonreligion by excusing religious practitioners from obligations owed the state, it logically follows that the state does not establish religion by requiring employers and unions to make exceptions with respect to the obligations of employees. *Hardison*, at 90-91 (Marshall, J., dissenting).

Finally, the IAM gives the classic *Lemon* tripartite test a nod when it argues in its petition that freeing religious objectors from having to support labor unions has a primary effect of establishing that particular religious practice.[10] It is hard to understand, as either a factual or legal matter, how that is true in this case. Mrs. Nichols will be paying the same fee as union members pay. The only difference is that she will be paying her fee to a charity instead of to the IAM. Since what is measured in this test is the effect upon the religious practice and not the effect on the union, how Nichols' religious beliefs are advanced by being compelled to pay the same amount of money is unclear.

The International Association of Machinists has challenged the constitutionality of Title VII before this Court and lower federal courts before and has repeatedly lost. *See, e.g., Anderson v. General Dynamics*, 648 F.2d 1247, 1248 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *McDaniel v. Essex International*, 696 F.2d 34, 37 (6th Cir. 1982); *IAM v. Boeing*, No. C80-899R (W.D. Wash. Aug. 12, 1981), *aff'd*, No. 81-3515 (9th Cir. Nov. 23, 1982) (a challenge brought by this Union against Boeing and decided adversely to the Union by both the district court and the Ninth Circuit in unpublished decisions). In a tireless campaign to deprive employees who dis-

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[10] Petition at 8-9.

agree with it of their civil rights, the IAM simply asks this Court to give it yet another hearing.

4. *Section 19 of the NLRA does not modify or repeal the religious accommodation provisions of Title VII.*

The IAM's argument that § 19 of the NLRA[11] defines or partially repeals Title VII has not been directly addressed by any United States Court of Appeals other than the one below. Nevertheless, that argument is squarely contradicted by fundamental rules of statutory construction.

The courts will neither consider one statute repealed by implication nor apply the specific over the more general statute unless there is first an irreconcilable conflict between the two statutes. *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

The IAM fails to show any conflict between § 19 and Title VII. Section 19 specifically requires that the charitable payment option be made available to employees who are members of churches which teach that church members may not be union members. Title VII requires that employers and unions accommodate the religious beliefs of employees, unless to do so would cause undue hardship. There is no conflict between these two statutes. If anything, they are complementary. The class of employees entitled to protection under Title VII is broader than that protected under § 19, but § 19 makes mandatory the charity payment. It is fair to conclude that Congress, in passing § 19, placed its stamp of approval upon the charity substitution payment requested by Mrs. Nichols.

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[11] 29 U.S.C. § 169.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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